United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

Proof of Service

75-1225

To be argued by
JESSE BERMAN

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 75-1225

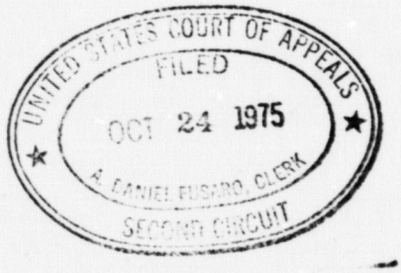
THOMAS DUVALL, :

Appellant. :

----------x

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION RENDERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.



JESSE BERMAN
Attorney for Appellant
351 Broadway
New York, New York 10013
(212) 431-4600

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APPELLANT'S STATEMENTS TO GNIAZDOWSKI AND CAREY, MADE IN CUSTODY, WITHOUT COUNSEL AND WITHOUT BEING INFORMED THAT A COMPLAINT HAD ALREADY BEEN FILED, WERE THE PRODUCT OF FEAR, OF APPELLANT'S WILL BEING OVERBORNE, OF MISLEADING AND IMPROPER ADVICE, AND OF EXHAUSTION AND HUNGER, AND DESPITE MIRANDA WARNINGS AND A PURPORTED WAIVER, CANNOT BE DEEMED VOLUNTARILY MADE, BY EITHER FIFTH AMENDMENT OR 18 U.S.C. § 3501 STANDARDS.

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

THOMAS DUVALL, :

Appellant. :

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ISSUES PRESENTED

1. Whether appellant's statements to Gniazdowski and Carey, made in custody, wihtout counsel and without being informed that a complaint had already been filed, were the product of fear, of appellant's will being overborne, of misleading and improper advice, and of exhuastion and hunger, and despite Miranda warnings and the signing of a purported waiver, cannot be deemed voluntarily made, by either Fifth Amendment or 18 U.S.C. § 3501 standards. And. whether appellant's statements to Carey, made in custody, without counsel and without being informed that a complaint had already been filed, were deceptively obtained and violated appellant's rights under the Fifth and Sixth Amendments and Massiah v. United States, 377 U.S. 201 (1964).

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Stewart, J.), rendered June 16, 1975, convicting appellant after trial by jury of the crimes of conspiracy [18 U.S.C. §371], possession of the contents of stolen mail [18 U.S.C. § 1708] and uttering forged government checks [18 U.S.C. §495] and sentencing him to six months imprisonment followed by two years probation on the conspiracy count, and to two years probation on all the other counts, to run concurrently with the term of probation on the conspiracy count.

Timely notice of appeal was filed, and this Court, on June 25, 1975, extended the appointment of Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

B. Statement of Facts

Appellant, together with co-defendants, Jones and Porter*, were initially charged, in a 34-count indictment, with conspiracy to possess checks stolen from the mails and to utter such checks after they had

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*/ The jury acquitted Porter of all charges against him.

been forged, as well as the substantive crimes of possessing and/or uttering various specific checks. As a result of several motions to suppress evidence as illegally seized, lengthy suppression hearings were held* and 11 of the 34 counts were dismissed, three of the overt acts were dropped and the alleged scope of the conspiracy was narrowed.**

At trial, appellant's position was an acknowledgement that he had possessed the nine checks which he had been accused of possessing.*** He also acknowledged that, as the government alleged, he might have placed some of the endorsements on seven of those nine checks.****

Appellant's defense was his lack of knowledge that the checks were stolen and his lack of intent to defraud when he endorsed the checks with names other than his own legal name. To support this position, appellant was able to point to several virtually uncontested facts:

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*/ "H", as used hereinafter, refers to minutes of the suppression hearings (H.1 through H.2336), March 21, 26 and 31 and April 1,2,3,4,7,8,9,10,14,15,16,17,18 and 21, 1975.

**/ The indictment reproduced as Item A in Appellants Joint Appendix is the 'clean copy' indictment which ultimately went to the jury.

***/ These were the checks payable to" Gluck(counts 3 and 11), Wilson(counts 4 and 12), Ronan(counts 5 and 13), Weideger (counts 6 and 14), Gordon(counts 7 and 15), G. Gustavson (counts 8 and 16), M. & M. Gustavson(counts 9 and 17), Vazquez(counts 10 and 18) and Bucenko(count 20 and 21).

****/ The Ronan, Weideger, Gordon, G. Gustavson, M. & M. Gustavson, Vazquez and Bucenko checks.

1. There was no claim that appellant had in any way stolen the checks.

2. There was no proof offered as to how appellant received the checks.

3. All of the checks were passed through appellant's grocery business, rather than clandestinely.

4. All of the checks were passed to merchants whom knew appellant well, and who, as the Simmons hearing proved, could never conceivably have any difficulty identifying appellant as the person who had paid them with those checks.

5. Appellant made no attempt to conceal or alter his handwriting in the endorsements.

6. Although appellant had endorsed some of the checks with the name "Benjamin Young," this was a name by which he was known to several of the merchants with whom he dealt, and thus, this was not any proof of intent to defraud.

7. Appellant, in his own handwriting, had written the name and/or address of his grocery store on the backs of several of the checks with the alleged fraudulent endorsement, and this was utterly inconsistent with an intent to defraud.

The entire case, therefore, depended upon whether the government could convince the jury that appellant had committed the acts with the requisite criminal knowledge and intent. To do this, the government introduced several post-arrest, in-custody statements, both inculpatory and, allegedly, falsely exculpatory, made by appellant to law enforcement officials, in the absence of counsel, after a criminal complaint had already been filed against appellant in this case. It is the introduction at trial of those statements, which appellant

claims as error on this appeal.

1) The Suppression Hearing

Appellant moved to suppress the statements which he made on the day of his arrest, June 3, 1974, to Secret Service Agent William A. Gniazdowski, and the statements he made on the following day, June 4, 1974, to Assistant United States Attorney Michael Q. Carey. Both Carey and Gniazdowski testified at the hearing, as did Secret Service Agents Terence Chodosh* and William Schwarick, who participated in the arrest of appellant.** Appellant Thomas 27X Duvall testified at the hearing. For the sake of clarity, as well as brevity, we will summarize their testimony chronologically and give page references, and we will identify the particular witness only when necessary.

A) The Filing of the Complaint

Agent Gniazdowski was the case agent in this investigation, and by June 3, 1974, he had amassed a

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*/ Chodosh is often referred to as "Kojak" or "Terry Kojak" in the testimony at the hearing. Taken in context, it is clear that Chodosh and Kojak are the same person.

**/ The many other witnesses called by the government at the hearing testified to matters other than the issue of appellant's statements.

strong circumstantial case against appellant. At 2:00 p.m. on that date, as had been previously planned, Gniazdowski met with Carey in Carey's office and they prepared complaints against appellant and his two co-defendants (H. 946,1212). A stake-out of appellant's store, at 168 Lenox Avenue (118th Street), in anticipation of the arrest of the defendants, had been in effect since 1:00 p.m. of that date (H.1216).

Shortly before 3:30 p.m., Gniazdowski and Carey went before the magistrate, where Gniazdowski swore to the complaints (H. 1036, 1329). The complaints were thus filed, initiating the criminal prosecution against appellant and making him a criminal defendant in a court case (H. 1321, 1326). Based on the complaints, the magistrate issued an arrest warrant for appellant (H. 1036).*

B) The Arrest of Appellant

Gniazdowski knew that if he arrests someone late in the day, it increases the probability that that person will not be arraigned until the following day and will have to spend the night in jail (H.1212).

When he left the courthouse, at about 3:30 p.m., Gniazdowski radioed his men to arrest the defendants (H.1036, 1114). According to Schwarick, he arrested appellant

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*/ The record is devoid of any explanation why the government elected to bring appellant to court by way of warrant and arrest, rather than by way of summons or letter directing him to appear.

at about 3:30 p.m. (H. 1577). The arrest occurred as appellant was driving his car north, on Madison Avenue, between 134th and 135th Streets, with one passenger in the front seat. Nine agents, in three cars, forced appellant's car to a stop. The agents were all armed with .357 magnum handguns, most of which were drawn and pointed at appellant (H.1463, 1596). The agents also had shotguns and bullet-proof vests (H.1492). Chodosh could "recall' one shotgun (H.1463); Schwarick was able to recall at least two shotguns, one which he himself aimed at appellant's head (H. 1579,1596), and one which Agent Doyle was aiming at appellant (H.1595). The agents had not received any communication that anyone had seen appellant with weapons (H.1599), and, in fact, appellant had no weapons in his possession when arrested. The agents, however, made a show of force: Chodosh pulled the passenger out of appellant's car (H.1463). Chodosh had no cause to arrest the passenger, and never did arrest him; he merely roughed him up. Appellant testified that Chodosh ripped the man's shirt off (H.1685). Chodosh would not deny this, but conceded diplomatically that the passenger's clothing "might have" ripped (H. 1490). And while the various shotguns and magnums were trained on the various parts of appellant's anatomy, Agent Vezeris "nudged" appellant out of the car (H.1579) by punching appellant in the shoulder (Schwarick - H.1597).

Appellant got out of his car and Schwarick patted him down for weapons. Appellant had no weapons. He was placed in the back of a Secret Service car, "hunched" over (H.1520), with his hands cuffed behind him (H.1495-1496). Schwarick sat alongside him and Agents Chodosh and Hoffman rode up front. On their way down to the Secret Service office (at 90 Church Street), Schwarick recited the Miranda warnings and "Mr. Duvall said nothing" (Schwarick - H.1581). Schwarick, who was sitting right next to appellant, and who gave appellant the Miranda warnings, never testified to any Miranda waiver by appellant in the car. Chodosh, who was busy up front, driving through heavy traffic, testified that appellant waived his rights in the car, but Chodosh could not remember anything specific said by appellant (H.1515).

C) The June 3 Statements to Gniazdowski

Arriving at 90 Church Street at about 4:05 or 4:10 p.m., appellant was placed in a small interrogation room ("a small room in the back of the office" - Chodosh-H.1464; "a small interviewing room" - Schwarick-H.1583).

According to Gniazdowski, the purpose of taking appellant to 90 Church Street was to photograph and fingerprint him (H.1135). But, instead of being photographed or fingerprinted upon his arrival, appellant was placed in the small interrogation room. He was ordered to strip naked and was given a strip search

(Schwarick - H.1583).*

As appellant was putting his clothes back on, Chodosh produced a waiver-of-rights form (H. 1584). Schwarick, in appellant's presence, chided Chodosh for wearing his gun, contrary to Secret Service procedure (H.1474), while 'processing' appellant (H.1585, 1466). Although the form purports, on its face, to be an advice-of-rights, with a waiver provision at the bottom of the page, to Chodosh/Kojak it was "our waiver of rights form" (H.1466). According to Chodosh, he read the form to appellant, gave it to appellant to read, and "I asked him to sign it" (H.1466). Appellant signed, at 4:20 p.m., minutes after being strip-searched, ten to fifteen minutes after arriving at 90 Church Street, and less than an hour after his shotgun-point, punch-in-the-shoulder arrest (H.1468, 1484). Chodosh did not question appellant.

Gniazdowski then appeared and orally advised appellant of his rights (H.1470, 1528), adding the gratuitous advice "that it would be good for him to cooperate if he wanted to " (H. 1555). Gniazdowski asked appellant if he had understood. Appellant

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*/ The Court expressed some surprise ("He had his clothes off?" H.1584). It is not ascertainable whether this surprise was due to shock and disbelief at the agents' procedures or merely surprise that Chodosh, who testified before Schwarick did, completely neglected to mention the stripping of appellant.

"indicated yes," but did not make any waiver, oral or otherwise, of his rights at that point (H.1529). This occurred "just a little after five" p.m. (H.1534), and was before appellant was fingerprinted (H. 1542). Chodosh then fingerprinted appellant (H. 1470), and then another agent photographed appellant (H. 1471). Gniazdowski appeared again, after an absence of 20-45 minutes, and told appellant that "The rights I told you a while ago still stand. I am going to ask you a few questions, okay?"* According to Gniazdowski, appellant said "yes." (H.1530). Gniazdowski questioned appellant until 7:00 p.m. (H.1534).**

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*/ From Gniazdowski's account, it would appear that he began questioning appellant some time between 5:20 and 5:45 p.m., after all the normal 'processing' had already been completed. At that time, they were but a two-minute drive from the courthouse, and Gniazdowski admitted that he knew that the magistrate in the Southern District was available for arraignments until 6:00 p.m. (H. 1212).

**/ In response to this questioning by Gniazdowski, appellant admitted owenrship of the store at 168 Lenox, admitted cashing checks there, admitted paying his bills with checks, denied knowing 'Benjamin Young,' denied using the name 'Benjamin Young' (H. 1535), denied ever seeing or signing the Ronan check [counts 5 and 13] (H. 1536), and admitted that he was president of 'The Prodigal Son' [one of the names for the store at 168 Lenox]. (H.1538).

D) The Additional Delay Before Arraignment

By the time this interrogation was over, it was too late to arraign appellant, and he was taken to the West Street jail, arriving at 7:21 p.m.*, and was 'lodged' there for the night (H.985). Appellant's overnight stay at West Street was thus not pursuant to any court order or commitment, but was merely the continuation of appellant's custody to await the availability of a magistrate first thing the following morning. Gniazdowski testified that he knew that a magistrate was available at 9 a.m. (H. 1211-1212). When the agents 'lodged' appellant at West Street, on the evening of June 3, they signed a form (Exh. 19 at the hearing) indicating that they were to remove him from West Street at "9:00 A.M." the following day, for no other purpose than arraignment before the court (H. 1011). The form stated, in bold capital letters, that appellant was to be

> ... REMOVED BY ... THIS AGENCY [SECRET SERVICE] FOR ARRAIGNMENT BEFORE THE UNITED STATES COMMISSIONER, OR JUDGE ... .

The record management officer at West Street, called by the government at the hearing, testified that agents cannot remove a prisoner from West Street at will, but only for

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*/ Dinner at West Street was from 4:30 to 5:30 p.m., and the kitchen closed at 7:00 p.m. (H.1013). No law enforcement official ever saw appellant eat anything during the 23 hours between his arrest and arraignment (H. 1551). Appellant candidly testified that he had"a few pieces of bread" (H. 1691).

arraignment, and that once arraigned, the prisoner passes to the custody of the marshal (H. 1010-1011).

But the agents did not pick appellant up at 9:00 a.m. on June 4; they did not take him from West Street until 10:58 a.m. (H. 985; Exh. 19). No explanation was offered for this delay.

Nor did the agents take appellant directly to the magistrate for arraignment. Gniazdowski testified that the defendants were brought first to 90 Church Street, at about 11:30 a.m. (H. 1076, 1126, 1532). Nor was appellant's next stop destined to be the magistrate's courtroom; instead, Gniazdowski took him to Carey's office for more grilling (H. 1078).

E) The June 4 Statements to Carey

The purpose of having Carey question appellant was to get appellant to talk. Both Gniazdowski and Carey ultimately admitted that this was so, although they first testified to more euphemistic, benevolent reasons. Gniazdowski, when first asked why he brought appellant to Carey, instead of to the magistrate, answered, "Procedure" (H. 1134), but when pressed, Gniazdowski admitted that the purpose was, "To be interviewed" (H. 1135). Carey's explanation was betrayed by what might be called his own Freudian slip:

> Q. What was the purpose of this interview?

A. To get information -- to advise Mr. Duvall --*

(H. 1322)

Q. Wasn't the purpose of this interview to get information from Mr. Duvall?

A. That's what I just said.

(H. 1323)

Thus, appellant was herded into Carey's office by Gniazdowski, and he remianed there for interrogation from 11:55 a.m. to 12:40 p.m. (H. 1289,** with Gniazdowski and an Internal Revenue agent present as witnesses.

Carey began by introducing himself and by telling appellant that he had been arrested for uttering forged government checks. Carey failed to tell appellant that a complaint had already been filed against appellant on the previous day. Thus, as far as appellant knew, he had merely been arrested for questioning by the police; they never informed him that he was already a defendant in a court case. Carey, however, knew that he was interviewing a defendant, in fact, an in-custody defendant, against whom Carey himself had prepared and filed the complaint only a day earlier (H. 1321, 1322, 1329, 1369).

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*/ If we are to accept the testimony of Gniazdowski, Schwarick and Chodosh/Kojak, appellant should hardly have needed to postpone arraignment just so that Carey could give him, verbatim, the exact same advice that each of the agents claimed to have already given to him.

**/ He was not arraigned until some time between 2:15 and 3:00 p.m., almost 24 hours after his arrest (H. 1081,1129).

After telling appellant that the charge was uttering forged checks, Carey "may have" told appellant that the maximum penalty per check is ten years imprisonment (H. 1307, 1309). Carey believed that appellant "was involved in at least ten [bad checks]," with a possible maximum sentence of 100 years imprisonment (H. 1311), and he would not deny that he had said so to appellant:

> Q. Do you recall using the phrase 'a possible sentence of a hundred years' in connection with this interview with Mr. Duvall?
>
> * * *
>
> A. I can't say that I did not use that phrase or something similar to it.*

(H. 1312)

Carey read appellant his rights, but in a curious form: After stating what each right was, Carey, reading from a form, would ask "Do you understand that?", and appellant would indicate "Yes. sir" (Gov. Exh 32). But neither the form nor Carey ever asked whether appellant wanted to assert a particular right or whether he wanted to waive any particular right:

> Q. Did you ever ask Mr. Duvall if he wanted a lawyer?
>
> A. No, I did not.

(H. 1316)

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*/ Mr. Carey is a lawyer and obviously talks like a lawyer. Appellant is not an attorney; he has little more than a grade-school education.

After each of his neutral questions (always, "do you understand?" Never, "do you want a lawyer?" or "do you have funds?", etc.), Carey recorded appellant's response (H. 1281), but only if Carey deemed that response "relevant." Carey "would not" record whether appellant asked him to explain or to re-read anything. As Carey described it at the hearing, he had recorded only appellant's ultimate response to a given question (H. 1292).

Carey began the interview by assuring appellant that:

> In a few minutes you will be taken before the United States Magistrate who will fix bail in your case.
>
> (Exh. 32)

Of course, Carey never told appellant that if he did not answer any questions, he would be taken forthwith before the magistrate (H. 1364). Instead, he apparently offered to help appellant on his up-coming bail application:

> Q. Did you tell [appellant] something to the effect of you need information from him so you can tell the magistrate things at the bail application?
>
> A. I may have.*
>
> (H. 1324)

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*/ Carey never told appellant that U.S. Attorneys were not the only ones who could make bail applications:

> Q. Did you ever say to Mr. Duvall something to the effect that instead of telling you his bail information, he could tell it to his defense lawyer when he gets one?
>
> A. No. (H. 1325)

Thus, with a defendant seated before him who had been in custody for almost 24 hours without seeing a defense attorney or a judge, Carey, whether intentionally or not, was dangling the magic word "bail" in front of appellant's weary eyes. Carey next asked appellant for some "background information" (Exh.32; H. 1319). Carey may also have coaxed appellant by mentioning 'cooperation,' but Carey's memory on this point was predictably vague:

> Q. Did you ever mention the word 'cooperation' or some similar word to Mr. Duvall?
>
> A. I may have. I don't recall.
>
> Q. Did you ever say something to the effect of 'we would like your cooperation on this'?
>
> A. To Mr. Duvall?
>
> Q. To Mr. Duvall.
>
> A. I may have.
>
> * * *
>
> Q. ...did you say anything to Mr. Duvall to the effect of what he might say to you might help him?
>
> * * *
>
> A. If I said anything about cooperation, I said if he cooperates he will be permitted to plead to a felony count or a number of felony counts; that the plea would be worked out if he cooperated and that as a result of his cooperation the nature and extent of his cooperation would be made known to the sentencing judge.
>
> (H. 1321)

Thus, appellant, who was already a defendant in this case, wound up baring his soul to the prosecuting attorney,* who, at the bail application two hours later, was suddenly the advocate again, arguing only the reasons for high bail, and failing to inform the magistrate of the positive and mitigating factors of which appellant had just informed him.**

F) Appellant's Testimony at the Hearing

Appellant denied being advised of his rights in the agents' car(H. 1687,1735,1736) and he denied that Gniazdowski ever advised him of his rights(H. 1774-1775). He acknowledged signing the written waiver at 90 Church Street, but explained that this was only after being frightened, humiliated and explicitly threatened (H.1699).

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*/ He told Carey that he had no checking or savings accounts, that he had never paid anyone with a U.S. Treasury check, that he paid his bills with money orders, and that he had paid Holtzman Carpet in cash (according to counts 16, 17 and 18, appellant paid Holtzman with forged Treasury checks). All of these statements were allegedly false exculpatory ones. Appellant also admitted to Carey that he was the owner/manager of the store at 168 Lenox Avenue (See Exh. 32).

**/ Appellant had told Carey that he was not a drug addict, that he never used drugs, that he had a heart condition and that he was under the treatment of a Dr. Shapiro. Carey brought none of this to the magistrate's attention (H. 1333-1334).

> After they got me in the office they stripped me. I was ma[de] a mockery of in the office. ... 'Take off your clothes; bend over; spread your feet; lift the bottom of your feet up.'
>
> (H. 1689)

Appellant stood naked while the agents went through his pockets (H. 1756). He was not allowed to make any phone calls (H. 1783), and before he ever signed the waiver form, Chodosh told him that he had better cooperate or he "would never see the light of day" (H. 1762). Appellant understood the waiver form, but testified that

> The only thing that I understood when I read it was I was trying to make it as convenient as possible for the agents in the room in whatever they wanted me to do.
>
> (H. 1764)
>
> * * *
>
> Q. ...you wanted to make it convenient for the agents because they had threatened that you would never see the light of day if you didn't sign the form, is that right?
>
> A. That's what it was.
>
> (H. 1765)
>
> ... I would have signed it without even reading it at the time that I signed it.
>
> Now, I signed the paper because I thought that I was under the impression that if I signed the paper that I would be let loose.
>
> (H. 1766. See also H. 1767, 1769, 1770)

As for Carey,

> He told me that if I cooperate with him -- he said these cases don't usually go to Court. I was never arrested by the Federal Government before, so I am thinking... that Mr. Carey, by me answering the questions that he asked me, was going to allow me to leave, so I had agree with him to answer the question that he asked me.
>
> (H. 1696)
>
> * * *
>
> [Carey] wanted some information in order to help me with my bail application.
>
> (H. 1804, See also H. 1809)
>
> He told me he was going to help me.
>
> (H. 1812)

The Court denied appellant's motion to suppress his statements to Gniazdowski and to Carey.

2) The Trial

At the trial, Gniazdowski was the government's final witness (T. 657-715).* He testified to both of appellant's statements. As to the June 3 statement, Gniazdowski testified that appellant admitted ownership of the store (T. 661) and presidency of the corporation which ran the store (T. 662), that appellant admitted paying suppliers with U.S. Treasury checks (T. 662), that appellant denied ever hearing the name Coreen Ronan (T.662a),

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*/ "T" refers to minutes of trial, April 22, 23, 24, 25, 29, 30 and May 1 and 2, 1975.

that appellant denied ever seeing or endorsing the Coreen Ronan check (T. 663-664)* and that appellant denied ever using the name "Benjamin Young" (T. 664).

As to the June 4 statement to Carey, Gniazdowski testified that appellant again admitted owning and operating the store (T. 677), that appellant denied ever paying suppliers with a U.S. Treasury check (T. 679),** and that appellant claimed he had paid Holtzman Carpet with cash (T. 680).***

In his summation, the prosecutor referred to appellant's statements, and stressed appellant's alleged lies to Gniazdowski in claiming ignorance about Benjamin Young and about the Ronan check (T. 974, 975).

The Court charged the jury on false exculpatory statements in connection with appellant's statements to Gniazdowski and Carey (T. 1026-1028).

Appellant was convicted on all the counts which were submitted to the jury.

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*/ This was crucial, for the Ronan check (Exh. 8) was endorsed "Benjamin Young" in appellant's own handwriting.

**/ This, too, was crucial, because, according to Gniazdowski, only a day earlier, appellant had admitted paying suppliers with the U.S. Treasury checks (T. 662).

***/ This was inconsistent with Holtzman's testimony that appellant had paid him with three U.S. Treasury checks (T. 333).

ARGUMENT

POINT I

APPELLANT'S STATEMENTS TO GNIAZDOWSKI AND CAREY, MADE IN CUSTODY, WITHOUT COUNSEL AND WITHOUT BEING INFORMED THAT A COMPLAINT HAD ALREADY BEEN FILED, WERE THE PRODUCT OF FEAR, OF APPELLANT'S WILL BEING OVERBORNE, OF MISLEADING AND IMPROPER ADVICE, AND OF EXHAUSTION AND HUNGER, AND DESPITE MIRANDA WARNINGS AND THE SIGNING OF A PURPORTED WAIVER, CANNOT BE DEEMED VOLUNTARILY MADE, BY EITHER FIFTH AMENDMENT OR 18 U.S.C. § 3501 STANDARDS. MOREOVER, APPELLANT'S STATEMENTS TO CAREY, MADE IN CUSTODY, WITHOUT COUNSEL AND WITHOUT BEING INFORMED THAT A COMPLAINT HAD ALREADY BEEN FILED, WERE DECEPTIVELY OBTAINED AND VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS AND UNDER MASSIAH V. UNITED STATES, 377 U.S. 201 (1964).

The mere giving of Miranda warnings and obtaining of a Miranda waiver does not automatically render all subsequent statements admissible: The issue of Fifth Amendment voluntariness must also be resolved, as well as the question of voluntariness under 18 U.S.C. §3501. The Court's landmark decision in Miranda v. Arizona, 384 U.S. 386(1966), did not in any way diminish the Fifth Amendment rights of an accused to suppress statements which were coerced or involuntary. Harris v. New York, 401 U.S. 222, 224(1971); Jackson v. Denno, 378 U.S. 368, 376 (1964); Rogers v. Richmond, 365 U.S. 534(1961).

But this case demonstrates how the fact that Miranda warnings were given and a Miranda waiver form was executed

can often successfully obscure serious Fifth Amendment voluntariness problems. It would indeed be a cynical and sinister distortion of the Fifth Amendment if compliance with the Miranda rule, which was established by the Supreme Court in order to graft Sixth Amendment safeguards onto the Fifth Amendment right of an accused, were now to be used by law enforcement agents as a mask and a whitewash and a veneer to conceal their violation of that very same Fifth Amendment. The word must go out to law enforcement officials that Miranda made the Fifth Amendment stronger, not weaker, and this case is one which cries out for this Court to make such a reaffirmation of the vitality of the Fifth Amendment.

The record herein, even if this Court accepts the testimony of the government's witnesses at the suppression hearing, establishes a poignant picture of coercion, deception and involuntariness.

Appellant, immediately upon his arrest, was placed in fear for his life; the agents deliberately used an overabundance of force against appellant, force which certainly would scare the daylights out of any normal mortal. This show of force, and the terrible fear which it necessarily procduced, were far beyond the force and consequent fear which normally accompany an arrest. Appellant was arrested by nine officers, with guns drawn

and pointed at him, with two shotguns pointed at his head.* His passenger, who was not involved and not even ultimately arrested, was roughed up for no apparent reason, his shirt being ripped, in appellant's immediate presence And if the .357 magnums and the shotguns could have been rationally dismissed by appellant as merely a threat of force, Agent Vereris supplied the actual force by punching appellant, who never resisted. In this context, the fact that Schwarick claimed to have then given appellant Miranda warnings in the car is really of no significance: Appellant was in no mental condition to make a voluntary and intelligent waiver immediately after that arrest scenario; nor did he make any such affirmative waiver in the car ("Mr. Duvall said nothing" - Schwarick, H.1581); nor did he make any of the statements at that time.

Then the delay and the more subtle types of coercion began: Rather than taking appellant to the magistrate for arraignment and appointment of counsel on the already-filed complaint, the agents took him to their office, purportedly for fingerprinting and photographing. But instead of fingerprinting and photographing appellant promptly, the agents exploited the opportunity as a means of getting him to talk before giving him up to

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*/ We respectfully ask this Court to pause and envision this scene, and to remember that appellant was merely being arrested for allegedly uttering bad checks.

the protection of a defense attorney. They made him strip. This was not normal procedure, certainly not in a case of non-violent, non-drug crimes.*

The first place to which appellant was taken was the small interrogation room, and it was in this small room that he was made to strip naked. No sooner did he get his clothes back on did Chodosh/Kojak produce the waiver form. And that is what Chodosh called it, "our waiver of rights form." In Chodosh's mind, the procedure was not aimed at advising appellant of his constitutional rights. To Chodosh, it was a procedure by which he gets appellant to waive his rights or, more precisely, to sign "our waiver of rights form," thereby apparently legitimizing anything that was to follow.

And what was to follow was not an arraignment, at least not for almost 24 hours. Gniazdowski appeared and claims to have repeated precisely the advice that Chodosh had just read. It was now only 5:05 p.m., and the magistrate was but two minutes away and would be there for another hour. At this point in time, appellant had already been in the agents' office for an hour, but they had been too busy stripping him and getting him to sign the waiver, so he had not yet been fingerprinted or photographed. After

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*/ No one would seriously imagine that John N. Mitchell was strip-searched before his arraignment.

these procedures were finally completed, Gniazdowski questioned appellant and obtained the statement.

From there, appellant was taken to spend the night in the now-defunct West Street jail, arriving after dinner had ended. The following morning, in direct violation of the terms of appellant's custody, the agents picked him up two hours late, and, instead of bringing him before the magistrate, took him first to their office and then to Carey's office, all of this in complete disregard of the prompt-arraignment dictates of Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943); and Fed. R. Crim. Proc., Rules 5 and 44.

It is virtually beyond serious dispute that the purpose of the Carey interview was to get more damaging admissions or allegedly false exculpatory statements out of appellant. It cannot be argued with any sort of candor that Carey's concern was to appraise appellant of his rights: According to the government's testimony, each of the three agents had already given the same advice to appellant, and Carey well knew that as soon as he would let appellant finally be arraigned, the magistrate and appointed counsel would adequately appraise appellant of those same, already-advised rights. If this Court had any lingering hope that Carey's purpose was really to give appellant needed advice, Carey's Freudian slip exposed his real motive:

Q. What was the purpose of this interview?

A. To get information -- to advise Mr. Duvall.

(H. 1322, emphasis added)

Q. Wasn't the purpose of this interview to get information from M.r Duvall?

A. That's what I just said.

(H. 1323)

If Carey's concern had really been to give appellant needed advice, advice which might form the basis for a learning and intelligent waiver, he should have told appellant that a criminal complaint had already been filed against him, making him a defendant in a court case, and not merely someone who had been brought in for questioning.

If Carey was ever going to get appellant to incriminate himself, he had to do so before arraignment, for after arraignment Carey would not be allowed to speak to appellant without the permission of appellant's appointed counsel. So Carey simply put off the arraignment until after he got appellant to make the statements, and, prior to questioning appellant, Carey never asked him the simple, straightforward question, "Do you want a lawyer?" (H. 1316). Instead, Carey frightened appellant with talk of a possible sentence of 100 years and then told appellant that he, Carey, needed information for appellant's bail application (H. 1324), and spoke of his appreciating appellant's cooperation. Carey got the statement he had set out to get.

* * *

Once a criminal prosecution has been initiated,

i.e. when an inquiry ceases to be merely a police matter and becomes an actual court case (with the filing of an indictment or complaint), the accused acquires certain additional rights. He must be promptly arraigned, and counsel must be appointed. Mallory, supra; McNabb, supra; Fed. R. Crim. Proc., Rules 5 and 44. He is entitled to a speedy trial. United States v. Marion, 404 U.S. 307 (1971). Law enforcement authorities are prohibited from placing him in a line-up unless his counsel is notified and is given an opportunity to be present. Kirby v. Illinois, 406 U.S. 682 (1972). And, once a complaint has been filed, the authorities are prohibited from attempting to question him without first notifying his attorney and allowing the attorney to be present. Massiah v. United States, 377 U.S. 201 (1964); United States ex rel. Lopez v. Zelker, 344 F.Supp. 1050 (S.D.N.Y., 1972).

Although prior to the initiation of a criminal prosecution, a properly warned suspect may waive his rights and consent to custodial interrogation without counsel present (Miranda, supra), once an indictment or a complaint has been filed, the accused must be promptly arraigned and counsel appointed, and counsel must be notified of the opportunity to be present at any questioning before there can be any waiver of rights. Lopez v. Zelker, supra, 344 F. Supp. at 1054. The absolute requirement of counsel, before there can be any waiver in post-indictment or post-

complaint questioning by law enforcement authorities, is to be enforced all the more vigorously when the authorities want to question a defendant who is in custody.

In the instant case, the complaint had been filed almost 24 hours before Carey questioned appellant. Carey knew of the filing of the complaint, but deceived appellant by not telling him about it. But for the delay on the part of the agents, appellant would already have been arraigned and would have had counsel*before the Carey interview took place.

This Court has never made any distinction between an indictment and a complaint on the question of the right to prompt appointment of counsel. United States v. Jones, 493 F.2d 323, at 325, 326 (2d Cir, 1974). Nor do the Federal Rules make any such distinctions. Rules 5 and 44, supra.

Nor can it be claimed that the purported Miranda waivers are dispositive in the instant case. A Miranda-type waiver, in the absemce of counsel, is not sufficient in a Massiah situation:

> First, assuming the Massiah protection may be waived, which is still a debatable question, the casual and relatively perfunctory invitation to a Miranda-style waiver is insufficient. When an

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*/ On the morning of June 4, if not in the late afternoon of June 3.

> indictment has come down, riveting tightly the critical right to counsel, a waiver of the right requires the clearest and most explicit explanation and understanding of what is being given up. There is no longer the possibility - and the law enforcement justification - that a mere suspect may win his freedom on the spot by 'clearing up a few things' .... Even in the courtroom where an impartial judicial officer is presumably impelled by no purpose but fairness, that officer must counsel with care and advise against the likely folly of a layman's proceeding without a lawyer. Von Moltke v. Gillies, 332 U.S. 708 (1948). We cannot settle for less where the waiver has been proposed by a law enforcement officer whose goals are clearly hostile to the interests of the already indicted person in custody.
>
> Lopez, supra, 344 F.Supp. at 1054.

Here, as in Lopez, appellant was not informed that a complaint had already been filed and that a criminal prosecution had, thus, already been initiated; Carey concealed this from appellant. In such a Massiah context, with Carey's deception and with the failure to promptly arraign appellant, a simple Miranda waiver cannot be held valid.* Once the complaint was filed, "adversary judicial proceedings proceedings" had been initiated against appellant and his right to counsel

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*/ Cf. United States v. Diggs, 497 F.2d 391, 394, n.3 (2d. Cir. 1974) [no pending prosecution, distinguished from Lopez situation]; United States v. Barone, 467 F.2d 247 (2d Cir. 1972) [defendant questioned in his own home, telephoned his lawyer before making any admissions, Massiah distinguished]; United States v. Ramirez, 482 F.2d 217, 222 (2d Cir. 1973) [no indictment or complaint filed, Massiah distinguished] ; United States v. Hall, ____ F.2d ____ (2d Cir. June 24, 1975), slip op. 4343, at 4340, n.4 [defendant was held on other state-court charges, no coercion or deception]; United States v. Masullo, 489 F2d. 217,222 (2d Cir. 1973) [no indictment or complaint filed, Massiah distinguished].

Appellant's statements to Gniazdowski, although they were made after a much shorter delay than the statements to Carey, must also be suppressed, for they were made while appellant was literally still shaking in fear from the punching and shotgun overkill effect of his arrest and from the humiliation of the stripping. They were not voluntarily and freely made. Fifth Amendment, supra; 18 U.S.C. § 3501. A new trial must be ordered.

POINT II

APPELLANT ADOPTS AND INCORPORATES BY REFERENCE ALL OF THE ARGUMENTS OF HIS CO-APPELLANT.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED, THE STATEMENTS SHOULD BE SUPPRESSED AND A NEW TRIAL SHOULD BE ORDERED.

Respectfully submitted,

JESSE BERMAN
Attorney for Appellant Duvall
351 Broadway
New York, New York 10013
(212) 431-4600

October 24, 1975

Counsel for appellant wishes to thank Steven Bernstein, law clerk, for his indispensable assistance in the preparation of this brief.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STEVEN BERNSTEIN, being duly sworn, deposes and says that on the 24th day of October, 1975, I served the within Brief for Appellant upon O.T. Wells, Esq. and Paul J. Curran, United States Attorney, by delivering true copies of same to them at 377 Broadway, New York, New York 10013 and One St. Andrews Plaza, New York, New York 10007, the addresses designated respectively by said attorneys for that purpose.

Steven Bernstein
STEVEN BERNSTEIN

Margaret L. Ratner

MARGARET L. RATNER
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4521470
Qualified in New York County
Commission Expires March 30, 1977

Received 10/24/75
Anna C. Hughey for
Otto J. Wells